No. 2891

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ED JOHNSON AND A. C. LAIRD

Plaintiffs in Error.

vs.

UNITED STATES,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court for the District of Alaska, Second Division.

F. M. SAXTON,
United States Attorney.

George B. Grigsby and Hugh O'Neill, Attorneys for Plaintiffs in Error.

SWEENEY, VARNEY & STRAUB, PRINTERS, PORTLAND

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STATEMENT OF CASE.

On the night of January 5, 1916, Deputy U. S. Marshals Miller, Holland, Reed and Terrell raided the Arctic Billiard Parlors in Nome and arrested the plaintiffs in error, Ed Johnson and A. C. Laird and eight others, whom they apprehended in the act of gambling. At the time of the arrest some of these parties were en-

gaged in a "stud poker" game with said Laird, and the others were engaged in a game of "pangingui" with said Johnson. Thereafter the United States Attorney filed an information in the U. S. Commissioner's court for Cape Nome Precinct against all of said parties, including the plaintiffs in error, Johnson and Laird, charging them with gambling in two counts, and invoking the jurisdiction of the United States Commissioner as a committing magistrate. When the matter came on for a hearing before the U. S. Commissioner, sitting as a committing magistrate, counsel for plaintiffs in error sought to invoke the jurisdiction of the U. S. Commissioner as a justice of the peace; endeavoring to have the information in the Commissioner's court considered as a complaint in a justice's court and requested that plaintiffs in error be allowed to plead and demanded a jury trial. All of which was refused by the U. S. Commissioner. After having heard the testimony offered, said Commissioner held the plaintiffs in error and five others to await the action of the grand jnry.

Thereafter, on the 6th day of April, 1916, the grand jury returned an indictment against the plaintiffs in error, Johnson and Laird, and five others, charging them with the crime of gambling in two counts. The first count charged the crime of playing "stud poker" and the second count charged "pangingui."

The first trial resulted in a "hung" jury, and the

second a verdict of "guilty" on the *first count* as to the plaintiffs in error and not guilty as to the other defendants therein. The verdict on the second count was "not guilty" as to all of the defendants therein.

The defendants, Johnson and Laird, plaintiffs in error herein, were each fined $500.00 and the costs of the action. They have sued out a writ of error and have assigned fifty-six errors.

POINTS AND AUTHORITIES.

I.

A transcript of the record of the trial, although entitled and certified as a "bill of exceptions" does not constitute a bill of exceptions and will not be considered by the appellaate court.

Compiled Laws of Alaska, section 1054.
McMahon vs. Duffy, 36 Or. 150, 152, par. 1.
Eaton vs. O. R. & N. Co., 22 Or. 477-502.
O'Connor vs. Van Hoy, 29 Or. 505, 511, par. 2.
Lincoln vs. Claflin, 7 Wallace 136.

II.

United States Commissioners in the District of Alaska, have the *power, as committing magistrates,* to hold "preliminary hearings" in misdemeanor cases and

to hold the defendants to await the action of the grand jury, whenever the United States Attorney in his discretion *invokes such power* by filing an information in the commissioner's court for his precinct charging such an offense.

Compiled Laws of Alaska, Sec. 2381.
U. S. vs. Folsom, 3 Alaska 226.
Compiled Laws of Alaska, Sec. 2379.
In Re Donnelly, 1 Pac. 783.
Compiled Laws of Alaska, Sec. 2583.
U. S. vs. Powers, 1 Alaska, 180, 187.
U. S. vs. John Sesnon Co., 3 Alaska 595.

III.

United States Commissioners in Alaska have the power as justices of the peace to *try* misdemeanors whenever a *complaint* is filed in the *Justice's court* for his precinct charging such an offense.

Compiled Laws of Alaska, Sec. 2520, 2521.

IV.

The action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review, unless it be clearly shown that such discretion has been abused.

Hardy vs. United States, 186 U. S. 224.

V.

Criminal *procedure* in Alaska is statutory. Hence, in the absence of statutory authority for the appointment of an elisor, the court is without authority to make such appointment.

Compiled Laws of Alaska, Sec. 2110.
30 Stat. L. 1253, Title and Enacting Clause.
Summers vs. U. S., 231 U. S. 92, 104.
Compiled Laws of Alaska, Sec. 2229.
State vs. Savage, 36 Or. 191, 201.

VI.

"That no challenge shall be made or allowed to the panel: A challenge is an objection to a particular juror, and may be either:

First, Peremptory or
Second, For cause."
Sec. 2230 Comp. Laws of Alaska.

VII.

"But on the trial of such challenge (to a juror), although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court

must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially."

Compiled Laws of Alaska, Sec. 2236.
State vs. Savage, 36 Or. 191, 202 par. 5.
Reynolds vs. U. S. 98 U. S. 145, 156.
Ex parte Spies et al, 123 U. S. 131.

VIII.

A challenge of a juror "for cause" without stating the particular grounds is insufficient.

Southern Pac. Co. vs. Rauh, 49 Fed. 696, 700.
24 Cyc., Page 336 and 337 and authorities cited in foot notes 99 and 5.

IX.

The ruling of the trial court will not be reviewed on appeal unless such ruling has compelled the defendant to accept an objectionable juror.

Ann. Cas. 1915 D. 98 note.
State vs. Thorne, 41 Utah 414, Ann. Cas. 1915 D. 90, 95.
Carter vs. State, 45 Texas Crim. Rep. 430.
McRae vs. State, 62 Fla. 74, 57 So. 348.
Cromer vs. Borders Coal Co., 152, Ill. App. 555.

State vs. Foster, 136 Iowa 527, 114 N. W. 36.
State vs. Addison, 134 La. 642, 64 So. 497.
Shunnway vs. State, 82 Neb. 152, 117 N. W. 407.
Colbert vs. Journal Pub. Co. (N. M.) 142 Pac. 146.
State vs. Sultan, 142 N. C. 569, 9 Ann. Cas. 310, 54 S. E. 841.
Colbert vs. State, 4 Okla. Crim. 500, 113, Pac. 558.
Darnell vs. State, 123 Tenn. 663, 134 S. W. 307.
King vs. State (Texas) 100 S. W. 387.

X.

Appellate courts will consider only the rulings on challenges to jurors who *actually sat at the trial.*

Ex parte Spies, 123 U. S. 131.

XI.

Where the proof is such that no other verdict save one of guilty is legally permissible, the courts will not reverse a case because of error in empaneling the jury.

Sullins vs. State, 79 Ark. 159, 9 Ann. Cas. 275.
State vs. Thorne, 41 Utah 414, Ann. Cas. 1915 D, 90, 96.

16 Ruling Case Law, Par. 106, p. 292.

XII.

"A witness is allowed to refresh his memory, respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing."

Compiled Laws of Alalska, Sec. 1497.

XIII.

"It is the right of the witness to be protected from insolent, insulting or improper questions, or from harsh or insulting demeanor."

Compiled Laws of Alaska, Sec. 1508.

XIV.

"A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of the times, places and persons present; and he shall be asked whether he has made such statements, and, if so, allowed to explain them. If the statements be in writing they shall be shown to the witness before any question is put to him concerning them."

Compiled Laws of Alaska, Sec. 1502.
State vs. Crockett, 39 Or. 76.
State vs. Martin, 47 Or. 290.
State vs. Goodager (Or.) 106 Pac. 638, 639.
State vs. Steeves, 29 Or. 85, 101, par. 5.

XV.

A witness can not be impeached by proof of an inconsistent statement of an immaterial matter.

Vol. I Wharton's Criminal Evidence (10th Ed.) Sec. 402, and cases cited in foot notes 1, 2, and 3.

XVI.

A grand juror can testify only to matters tending to impeach a witness by showing inconsistent statements of said witness before the grand jury.

Compiled Laws of Alaska, Sec. 2136.

XVII.

A detective is not an accomplice if he co-operates with the accused for the purpose of detecting him.

State vs. McKean, 36 Iowa 343, 345, 14 Am. Rep. 530.

People vs. Ballinger, 71 Cal. 17, 11 Pac. 799.
Wharton's Criminal Evidence (10th Ed.) page 923 and foot note 15.
Underhill on Criminal Evidence (Sec. ed.) Sec. 69, p. 120, and foot note 101.

XVIII.

It is only that part of the testimony of an accomplice *tending to connect the defendant with the crime* that needs to be corroborated.

Compiled Laws of Alaska, Sec. 2262.

XIX.

The owner or lessee of a building who knowingly permits it to be used as a gambling house is *particeps criminis* in such unlawful games.

Rosencrans vs. U. S. 155 Fed. 38, 47.
14 Cyc. 489.

XX.

A general exception to an instruction, which does not suggest or point out the defect complained of, so as to bring it distinctly to the court's attention, and afford an opportunity to remedy the defect complained of, if any exists, presents no question for review.

Compiled Laws of Alaska, Sec. 2274.
Ball vs. U. S., 147 Fed. 32, 43.
Cass Co. vs. Gibson, 107 Fed. 363, 367.
Shelp vs. United States, 81 Fed. 694, 700.
Columbus Const. Co. vs. Crane Co., 98 Fed. 945, 951.
Railroad Co. vs. Varnell, 98 U. S. 479, 483.
Mobile & Montgomery R. Co. vs. Jurey, 111 U. S. 584, 596.
Newport News and Mississippi Valley Co. vs. Pace, 158 U. S. 36, 40.

XXI.

The refusal to give instructions covered by the general charge is not error.

State vs. Megorden, 49 Or. 259, 269, par. 9.
State vs. McDaniel, 39 Or. 161, 184, par. 20.
State vs. Eggleston, 45 Or. 345, 360.
State vs. Gray, 46 Or. 24, 31, par. 5.
State vs. Smith, 47 Or. 485, 487.

XXII.

"That neither a departure from the form or mode prescribed by this act, in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid, unless it has actually

prejudiced the defendant, or tends to his prejudice in respect to a substantial right."

Compiled Laws of Alaska, Sec. 2261.

XXIII.

"Unless it can be seen that prejudice has resulted from error of the trial court, prejudice will not be presumed."

Hoogendorn vs. Daniel, 202 Fed. 431, 433.
Jackson vs. U. S., 102 Fed. 473, 477.

XXIV.

The refusal of a witness, who is a particeps criminis with defendants, to testify on the ground that his testimony would criminate him, is a circumstance which the jury may consider in determining the guilt or innocence of defendants.

Clementine vs. State, 14 Mo. 112, 115.
Sec. 2257 Comp. Laws of Alaska.
Central Stock and Grain Exchange vs. Board of Trade of City of Chicago, 196 Ill. 396, 63, N. E. 740, 744.
U. S. vs. Carter, 217 U. S. 286, 316, 317.
State vs. Barlette, 55 Me. 200, 217.
State vs. Cleaves, 59 Me, 298, 300.

Wigmore on Evidence, Vol. III, paragraph 2272 and notes, Vol. I, Par. 289.

Wharton's Criminal Evidence (10th Ed.) par. 478.

Diggs, Caminetti et al. vs. U. S., 242 U. S. 470, 492-495.

XXV.

The length of time for which a trial court will hold a jury to deliberate upon their verdict is in the discretion of the trial court.

Driver vs. State, 37 S. E. 400, 112 Ga. 229.

Gilbert vs. Com., 51 S. W. 590, 21 Ky. Law Rep. 115.

State vs. Rose, 44 S. W. 329, 142 Mo. 418.

Young vs. State, 26 Ohio Cir. Ct. R. 749.

Russell vs. State, 92 N. W. 751, 66 Neb. 497.

Jahnke vs. State, 94 N. W. 158, 68 Neb. 154.

Com. vs. Martin, 34 Pa. Sup. Ct. 457.

Wishard vs. State, 115 P. 796, 5 Okla. Cr. 610.

XXVI.

Sending a jury back for further deliberations upon their verdict after they have reported that they cannot agree is not an unusual proceeding and is within the discretion of the trial court.

Hyde vs. United States, 225 U. S. 347, 383.
State vs. Olds, 76 N. W. 644, 160 Iowa 110, par. 5.
Stage vs. Pierce, 37 S. W. 815, 136 Mo. 34.
Wilson vs. State, 70 S. W. 57, 109 Tenn. 167.
Muckelroy vs. State, 42 S. W. 383 Texas.
Carlisle vs. State, 56 S. W. 365, Bill No. 3.
Secor vs. State, 95 N. W. 942, 118 Wis. 621.
People vs. Koerner, 102 N. Y. S. 93, 98.
State vs. Powell, 56 S. E. 23, 75 S. C. 494, par. 5.
Terry vs. State, 97 S. W. 1043.
State vs. Richardson, 115 N. W. 220.
State vs. Golliman, 60 S. E. 682.
Territory vs. Donohue, 113 P. 601.
Sandefer vs. Com., 137 S. W. 504, 143 Ky. 655.
State vs. Clark, 135 P. 1083.
Endleman vs. U. S., 86 Fed. 456.

ARGUMENT.

Before considering any of the errors assigned by the plaintiffs in error, we desire to direct the court's attention to the pretended bill of exceptions in this case. An inspection of such bill of exceptions will disclose that while it is entitled "Bill of Exceptions" and has the certificate of the trial judge to that effect, the 131 pages of matter contained therein constitute a transcript of the entire proceedings of the trial, including all of the evi-

dence, the objections thereto, the rulings of the court thereon and the exceptions taken thereto and some of the arguments of counsel, but no classification or statement of facts upon which the exceptions are based. Section 1054, Compiled Laws of Alaska, is the statute governing the form of a proper bill of exceptions in this jurisdiction, and the statute was taken verbatim from the Oregon statute, section 171 Lord's Oregon Laws. This section was construed by the Supreme Court of Oregon long before its adoption by Congress as a part of the Alaska Code, and therefore Congress adopted the construction that had previously been given this section by the Oregon Supreme Court. However, in the absence of such statute, the rule is the same.

On page 139 of the transcript containing said pretended bill of exceptions we find this statement:

> "The foregoing is all of the testimony which was given and admitted on the trial of said case."

Then follows the argument of counsel, the instructions of the court in haec verba, then a repetition of the instructions excepted to by counsel for plaintiffs and the exceptions thereto, followed by instructions requested by counsel for plaintiff in error and refused by the court, with the exceptions thereto, and lastly the verdict and judgment.

An almost identical bill of exceptions was considered

by the Supreme Court of Oregon in Eaton vs. O. R. & N. Co., 22 Or. 497-502, Mr. Justice Bean speaking for the court, in which that court said:

> "As appears from brief of counsel for appellant, the errors relied on here are, in overruling a motion for non-suit, in the admission of a certain letter in evidence, and the giving of a certain instruction to the jury. These assignments of error are claimed to be presented by what counsel terms a bill of exceptions, but which is nothing more or less than the whole testimony and proceedings of trial as it took place extended from the stenographer's notes. The testimony alone covers more than one hundred pages of typewritten matter, the large proportion of which has no relevancy or applicability to the question sought to be presented for our consideration. Scattered through this mass of testimony are the objections of counsel, the rulings of the court, and the exceptions taken thereto. The whole proceedings of the trial have been certified here as a bill of exceptions, and we are expected to labor through this voluminous record, segregate and classify it, and out of it to construct a bill of exceptions, and then determine whether the assignments of error are well taken. This practice is in utter disregard of the plain provision of the civil code, which requires that the exception should be stated with so much of the evidence or other matter as may be necessary to explain it, and no more (section 232); and has repeatedly received the disapproval of this court. In State v. Murray, 11 Or. 414, Mr. Justice Thayer,

speaking for the court, says: 'Such a practice is not only unlawyer-like, but it is an imposition upon the court. . . . It presents an unwieldly document, imposes a difficult labor upon the court, to search out and ascertain the points assigned as error, and creates an unnecessary expense. It is a shameful procedure, and the judges of the circuit court should interfere and put a stop to such kind of practice.' Again, in Tucker v. S. F. M. Co., 15 Or. 584, the same judge in discussing a question sought to be raised by a bill of exceptions like the one in this case, said: 'Whether the evidence sent up here in what counsel are pleased to term a bill of exceptions, will warrant such a conclusion or not, I shall never know; for I never intend to look into it to ascertain whether such is the fact or not. If counsel desires a review of such questions, they must prepare a bill of exceptions as provided in the civil code of the state. They have no right to throw together in a mass all the testimony given in the case as taken down and extended by a shorthand reporter, as has been done in this case, and bring it here and require this court to examine it, and find its conclusions of fact therefrom. No such practice should be tolerated by an appellate tribunal in the proceeding to review errors of law. . . . Many questions of law may involve an examination of the testimony given in a case, such as the overruling of a motion for a non-suit; but ordinarily an exception requires a statement of a small portion of the evidence in order to explain it. But the fault here referred to is not that the objection constituting the exception

is stated with more of the evidence than is necessary to explain it—the fact is, it is not stated at all. The proceedings had at the trial, and the evidence taken, are marshaled and sent here for this court to examine and consider the various exceptions indicated therein.' Further on he said: 'The statute clearly intends that a statement of the exception shall be made up, settled, allowed, and signed by the judge, and filed with the clerk, and thereafter it is deemed and taken as a part of the record of the cause (Code, par. 230). No such labor-saving shift as that which seems to have been devised and adopted in this case can be countenanced. It would lead to so loose a practice that counsel could not know nor courts determine what questions were involved or were to be decided.'

In Janeway v. Holston, 19 Or. 98, Strahan, J., in speaking of a similar bill of exceptions, says: 'The reporter's notes contain ample material from which a bill of exceptions might have been constructed; but the wildest liberty in the use of language cannot torture this writing into one. Section 230, Hill's Code, defines an exception, and section 231 points out the method of making the same a part of the record, so as to present a question for review in this court; and we have several times endeavored to point out the necessity of observing these provisions of the code in the preparation of a case on appeal. If these provisions of law be utterly disregarded, there is nothing presented which we can properly examine.' And in Fiore v. Ladd, ante

202, the court, in speaking of the practice of making a part of the bill of exceptions all the evidence given on the trial when no questions are presented for review calling for an examination of the evidence, said: 'This practice is in disregard of the plain provisions of the statute (Hill's Code, par. 232), as well as all rules governing the preparation of bills of exceptions, is unnecessarily expensive to litigants, and imposes the arduous task upon this court of examining vast amount of irrelevant and immaterial matter.'

The provisions of our statute introduce no new rule in this matter, but are merely declaratory of the law as it already existed. In Pennock v. Dialogue, 2 Pet. 15, Mr. Justice Story condemns the irregularity, inconvenience and expense of putting the entire evidence of a case into the bill of exceptions, and expressed the regret of the court that such a practice should prevail. In Zeller v. Eckert, 4 How. 297, Mr. Justice Nelson said: 'This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice. Only so much of the evidence given on the trial as may be necessary to present the legal questions thus raised and noted, should be carried into the bill of exceptions. All beyond, serves only to encumber and confuse the record and to perplex and embarrass both court and counsel.' In Johnston v. Jones, 1 Black. 220, Mr. Justice Swayne, in speaking of this practice, said: 'The court desires to put on

record again its condemnation of this irregularity, and to express the hope that a better practice may prevail hereafter in all cases intended to be brought before this court for revision.' Again in Lincoln v. Claflin, 7 Wall. 136, Mr. Justice Field, in delivering the opinion of the court, used this language: 'A bill of exceptions should only present the rulings of the court upon some matter of law, as upon the admission or exclusion of evidence, and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearings of the rulings upon the issues involved. If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony; if the facts are disputed, it will be sufficient if the bill alleges that testimony was produced tending to prove. If a defect in the proofs is the ground of the exception, such defect should be mentioned without a detail of the testimony. Indeed it can seldom be necessary for the just determination of any question raised at the trial to set forth the entire evidence given; and the practice in some districts — quite common of late—of sending up to this court bills made up in this way—filled with superfluous and irrelevant matter—must be condemned.'

The object of a bill of exceptions is to bring into the record the particular matter excepted to, and which the record would not otherwise disclose. It should, therefore, be drawn up concisely, but as explicitly as possible, with a view to stating all the

facts and circumstances necessary to the statement of the point of law intended to be raised. (State v. Drake, 11 Or. 396; Powers, App. Pro. 225; Green, Pleading & Practice, par. 1140.) The object is to present the naked legal question, and only such facts as are necessary to explain its relevancy to the particular case should be stated. With such a record, it is only necessary for this court to consider and determine the question of law presented, and not be compelled to labor through a voluminous record to ascertain the facts upon which the question is based, and having done so, to be met with a petition for rehearing, as is not infrequently the case, in which the legal conclusions are not controverted, but 'respectfully but earnestly insisting that the court is mistaken as to the facts.' If counsel desire the entire proceedings of the trial to be made a part of the record, there perhaps can be no objection; but ordinarily it should be attached to and made a part of the bill of exceptions as an exhibit, or in some other appropriate way, and not massed together, entitled a bill of exceptions, and certified here for us to examine, and ascertain whether the trial court erred. Cases may and often do arise in which it is necessary for this court to examine the evidence upon the entire case, or upon such particular point. In such cases the bill of exceptions must, of course, contain the evidence; but there should be embodied in it only the evidence bearing upon the particular point presented. We do not desire or intend to enforce any technical or refined rule in this matter; and when the question sought to be presented is

clearly stated and readily understood, we shall examine and decide it, although the record may contain much irrelevant and immaterial matter. But where, as in this case, the question of law depends entirely upon facts which are in dispute between counsel, we cannot be expected to examine the entire record of the trial, separate the material from the immaterial matter, and undertake to decide with whom the facts are. It was the duty of the counsel, in the preparation of the bill of exceptions, to have segregated the evidence, and brought here only such as is applicable to the point raised, and then we could have determined the question intelligently. If the practice adopted in this case is to prevail the statute becomes meaningless, and the office of a bill of exceptions entirely abrogated; and it is only necessary in all cases to embody in the record a copy of the stenographic report of the trial as and for a bill of exceptions. Such a labor saving process cannot receive the approval of this court."

In O'Connor vs. Van Hoy, 29 Or. 505, 511, paragraph 2, Mr. Justice Wolverton quoted with approval from section 809 of Elliott's Appellate Procedure, as follows:

"It is not enough to state exceptions in the bill. The facts on which the exception are based are quite as important as the exceptions. Where the facts are not stated there is nothing demanding consideration, for without them neither the character nor the influence of the ruling can be ascertained or

determined." See Phoenix Life Insurance Company v. Raddin, 130 U. S. 195 (7 Sup. St. 500); Kelly v. Murphy, 70 Cal. 562 (12 Pac. 467). And such is the case under the practice in this state; State v. Clements, 15 Or. 246 (14 Pac. 410). The objection to the bill of exceptions is not so much that the facts are not stated in the record, for it purports to contain all the facts of the trial, but that they are not so grouped and stated with reference to the exceptions as to show the nature and influence of the ruling upon which error is alleged. By reading the testimony of witnesses seratim, and noting the introduction of exhibits, etc., together with the objections, rulings and exceptions, the court might be able to predicate a pertinent assignment of error, but this counsel should do. This court has heretofore in like instances declined to thus ascertain for itself the question sought to be presented (Hamilton v. Gordon, 22 Or. 557, 30 Pac. 495), and we decline to do so in this case so far as the rulings upon the introduction of evidence are concerned."

Under the foregoing authorities we submit that the pretended bill of exceptions in this case is wholly insufficient to serve the purpose of a bill of exceptions and should be disregarded by this court.

ON THE MERITS.

In considering the errors assigned by the plaintiffs in error, we have numbered the paragraphs to corre-

spond to the paragraphs in the brief of plaintiffs in error treating the same subject. However, in our references to Assignments of Error, we have used the numbers by which such assignments are *designated in the transcript* and not the numbers by which such assignments are designated in their brief.

We have not considered it necessary to discuss the Assignments of Error waived by counsel for plaintiffs in error in their brief, to-wit: 1, 12, 13, 14, 15, 16, 17, 18, 32 and 39.

At the threshold of this argument we desire to emphasize the declaration of this Court in Hoogendorn vs. Daniel, 202 Fed. 431, 433, and Jackson vs. United States, 102 Fed. 473, 477, that:

> *"Unless it can be seen that prejudice has resulted from error of the trial court, prejudice will not be presumed."*

This is the law for Alaska as announced by this Court and no argument in support of the reasonableness or justness of the same is required. Prejudice must be shown, it will not be presumed.

PARAGRAPH I.

(Assignment of Error No. II)

Counsel for the plaintiffs in error have sought by a motion to quash the indictment to raise the question as to the power of a United States Commissioner in Alaska to hold a defendant to await the action of the grand jury upon a charge accusing the defendant of a misdemeanor. It is quite evident that counsel have mistaken their remedy. A motion to quash certainly cannot question a proceeding further back than the actions of the grand jury returning the indictment. There is no connection between the proceedings by which one accused of a crime is held to await the action of a grand jury and the indictment returned by the grand jury.

As to whether or not the plaintiffs in error were or were not held to await the action of the grand jury is quite immaterial in this case, and it is equally immaterial whether the United States Commissioner acted with or without jurisdiction in so holding them. In no event can such a question be raised by attacking the indictment. The indictment is in no respect dependent upon what had previously occurred before the United States Commissioner. If the grand jury was regularly drawn and empaneled, and the indictment regularly returned in due form upon legal evidence, then such indictment is immune to an attack by a motion to quash

and any other matters are foreign to the purpose of such motion.

Counsel for plaintiffs in error claim that the proceedings before the United States Commissioner constituted a trial. If that be true, the remedy would be a plea of former jeopardy and not a motion to quash the indictment. That phase of the question will be discussed under the 37 and 38 assignments of error, paragraph XI, herein.

PARAGRAPH II.

(Assignments of Error III to VIII)

The second trial of this case was set for April 17, 1916, but upon the convening of court on that day the United States Attorney informed the Court that the United States Marshal had been unable to find three witnesses on behalf of the Government for whom he had subpoenas and that he could not proceed with the trial until such witnesses should be found. These witnesses were Charles Mason, A. Hanson and Elmer Adams, all present and engaged in the games for which plaintiffs in error were indicted. These witnesses had avoided the service of a subpoena by hiding during the first trial of this case, appeared in their accustomed haunts as soon as the taking of testimony closed, had disappeared as soon as the jury was discharged without reaching a ver-

dict, and the Marshal's force, after searching the town diligently, was unable to find them. These facts were all well known to the Court, but do not appear in the record. The Court was satisfied that the plaintiffs in error were responsible for the disappearance of these witnesses, but had no legal proof thereof. Under these conditions the Court postponed the trial practically from day to day from April 17 to April 26, being a total period of nine days and six successive postponements. At the end of that time the plaintiffs in error produced the witness, Chas. Mason, and stipulated as to the other two.

In Hardy vs. United States, 186 U. S. 224, we find this statement of the law as applicable to Alaska, to-wit:

> "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not a subject to review by the court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question."

There is no showing that this delay of nine days was in any way prejudicial to the plaintiffs in error, and the postponement was therefore a matter entirely within the discretion of the trial court.

PARAGRAPH III.

(Assignment of Error No. IX)

The basis of the ninth assignment of error is the denial of defendants' motion for the appointment of an elisor to serve the special venire. The only probative facts stated in the affidavit upon which the motion is based is that U. S. Marshal Jordan and some of his deputies were witnesses upon the former trial of said cause against the defendants. The statements of what somebody testified to on the former trial is in the nature of "hearsay" testimony and can have no probative force. On the argument of this motion counsel for defendants conceded that there was no personal animosity on the part of the Marshal (transcript, page 49) or his deputies against the defendants. Is the mere fact that the Marshal and some of his deputies are called as witnesses for the prosecution sufficient to establish his disqualification to perform the duties of the Marshal's office in connection with summonsing the jury? Or if we go beyond the probative facts alleged in said affidavit and consider what some one testifies to on the former trial, what do we find in said testimony to disqualify the Marshal? He and his deputies, being well known, the only chance to detect gambling was to hire some one to act as a detective. His instructions to the detective were to find out where gambling was being carried on and report to his office; no instruction to go to defendant's place or

any particular place. The detective located gambling at the defendant's place, reported it to the Marshal's office at a time when the Marshal was in St. Michael, a hundred miles away, with the result that Deputies Miller, Holland, Reed and Terrell made the raid and caught the defendants in the act of gambling. Of course, these deputies were witnesses at the trial, giving in evidence the facts constituting the res gestae of the raid. The Marshal was likewise a witness to show his employment of the detective. Did any one of these officers go beyond his duty as such officer? The deputies arrested the defendants when they caught them in the criminal act. The Marshal showed a higher conception of his official duties than many men have done when he was willing to pay some one else to perform a duty of his office which he could not do himself by reason of the nature of that duty. Is it possible that the statute has made the duties of the Marshal so inconsistent that if he performs his duty in the enforcement of the law against gambling that he disqualifies himself to perform his statutory duty in serving a special venire to try the violators of the gambling laws?

And this leads to an inquiry as to what is the Marshal's duty in reference to serving a special venire in any case.

The procedure in criminal cases in Alaska is statutory. This is manifest from the very first section of

the Code of Criminal Procedure (Section 2110 Compiled Laws of Alaska, 30 St. L., page 1285), which says:

> "That proceedings for the punishment and prevention of the crimes defined in Title XIV of this act shall be conducted in the manner herein provided."

The same intent is further manifest by the title to said act, which is (30 St. L. 1253):

> "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district."

and the enacting clause thereto, which reads:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows:"

In Summers vs. U. S., 231 U. S. 92, 98, 104, it was determined that our procedure was controlled by the law of this Territory rather than the Federal law governing procedure in U. S. Courts. This principle is settled by that case. Mr. Justice McKenna wrote the opinion, and in discussing the Alaska Criminal Code and Code of Criminal Procedure, says on page 101 of said opinion:

"The Alaska Code is quite an elaborate code of substantive and adjective law, the former containing twelve chapters of definitions of offenses against the person and property, the public safety and the public peace, the other containing elaborate and circumstantial provisions for the indictment and trial of offenders, their sentence and punishment, and a provision for appellate review. It seems to omit nothing of circumstances or detail necessary to a careful and advanced procedure."

On page 102 of said opinion:

"In the latter case (referring to Clinton vs. Englebrecht, 13 Wall. 434, 445), it was said: 'That the whole subject matter of jurors in the Territories is committed to territorial regulation.' "

And again, on page 104 of said opinion:

"It covers every step in criminal proceeding, the first accusation, arrest, preliminary inquiry of guilt, duties of officers and magistrates, formation of grand juries, the indictment, trial and its conduct, verdict, sentence and judgment."

Section 2228, Compiled Laws of Alaska, applies only to the summonsing of jurors on the "regular panel," but the following section 2229 is the law governing in this case. It reads:

"The trial jury shall be formed as follows: When the action is called for trial the clerk shall

> draw from the trial jury box of the court, one by one, the ballots containing the names containing the jurors until the jury is completed or the ballots are exhausted. If the ballots become exhausted before the jury is completed, the Marshal, under the direction of the court, shall summons from the bystanders or the body of the district so many qualified persons as may be necessary to complete the jury."

This section prescribes the procedure in case there are not enough names in the trial-jury box to complete the jury, and there is no provision for the appointment of an elisor. The provision is that the *Marshal* shall summons such additional persons as may be required to complete the jury.

Under this statute the court was without power to appoint an elisor if the Marshal had been disqualified.

Section 2229 of the Compiled Laws of Alaska was evidently taken from the Oregon Code with slight modifications (Section 180, Hill's Code, 116 Lord's Oregon Laws). In State vs. Savage, 36 Or. 191, 201, the question was raised as to the power of the trial court to appoint an elisor under conditions not provided by statute, but that case was decided without determining that question. However, the comments of the court upon the facts under the *assumption* that the trial court had such power, are pertinent in this case. The court said, speaking through Mr. Justice Moore:

"Assuming, without deciding, that the authority of the court to appoint such person is clear, and that the obligation to do so is imperative, was such power evaded or duty violated in the present instance? The solution of this problem must depend upon whether the sheriff was interested in the result of the action. The mere expression of an opinion, from the facts before him, as to the defendant's guilt, did not necessarily render him interested in the result of the action, or disqualify him from selecting talesmen: People v. Shuler, 28 Cal. 490. In Friery v. People, 2 Abb. Dec. 215, a jury having been empaneled, the accused submitted a challenge to the array, the first ground of which was that the sheriff or summoning officer had formed or expressed an opinion as to the guilt or innocence of the prisoner. Mr. Justice Wright, in commenting upon this question, says: 'Plainly, the first ground of challenge was without substance. The idea that the mere expression of an opinion by the officer designated by law to summons jurors as to the merits of a case that may chance to be on a calendar of a court for trial, or in respect to the guilt or innocence of a party under indictment, is matter for challenge to the array, is as absurd as it is novel.' The sheriff is the chief executive officer and conservator of the peace of the county: Hill's Ann. Laws, par. 999. It is thus incumbent upon him, within the boundaries of his county, to render to the prosecuting officers all the assistance reasonably in his power to suppress crime and to punish criminals; and, if he entertains the opinion that a person sus-

pected or charged with the commission of an offense is really guilty, his conscience furnishes a justification for the effort he puts forth in the performance of his duty. The sheriff says he received, as a reward, all the compensation he demanded or expected for securing the money feloniously taken, and denies that he was to receive, or that he expected to secure, any sum whatever in the event of the defendant's conviction. The sheriff's interest in the result of the action was thus in issue, and the court, by overruling the motion to appoint an elisor, in effect determined the question in his favor. The evidence upon this issue is made a part of the transcript, an examination of which, in the light of the decision thereon, fails to convince us that any error was committed in allowing the sheriff to select the talesmen."

Applying the above rule, was the marshal disqualified? It is admitted that he held no animosity against the plaintiffs in error, his testimony as a witness was confined to his employment of the detective (Bill of Exceptions, page 90 of Transcript), and the only evidence of any interest in the case whatever is the fact that he employed the detective to look up gambling in the town and report to his office. He had no interest in the result of this trial, except the interest that every good citizen feels in the enforcement of the law. That could not disqualify him. He had no financial interest in the result of the trial. His obligation to pay the detective was in no way dependent upon the result of

the trial and had been satisfied long before the trial occurred. In the Oregon case the sheriff received a reward for apprehending the defendants and the court held that he was not thereby disqualified. In this case the marshal hires the detective and directs him to hunt up gambling without knowing who would be detected. That occurred nearly four months before the trial and was a closed incident at the time of this trial so far as the financial obligation was concerned. Hence, at the time of the trial, the marshal was not interested in any way in the result of the trial, other than the interest common to all good citizens.

In discussing a somewhat similar case the Supreme Court of Pennsylvania, said (Clark vs. Com. 123 Pa. St. 555, 573):

> "If the sheriff had been an eye witness of the crime and had arrested the perpetrator on view of it, he would have discharged a plain duty and no disqualification would have resulted from his knowledge or his action upon it."

The marshal's deputies in the case at bar, having entered the Arctic Billiard Parlors, discovered the plaintiffs in error in the act of committing a crime. They arrested the plaintiffs in error as was their duty in such case under the statute; later they were required by the government to appear and testify as witnesses against plaintiffs in error as to what occurred at the time of the

arrest. The law compelled them to do so. Hence, in so far as counsel for plaintiffs in error base their motion for the appointment of an elisor upon the fact that some of the marshal's deputies were witnesses upon the former trial, they are taking the position that because these deputies arrested the plaintiffs in error while committing a crime in the view of such officers, such deputies thereby disqualified themselves to summons such special venire. In other words by performing one statutory duty, they disqualify themselves to perform another duty imposed by the same statute. We insist that the Alaska statute prescribing the duties of the marshal and his deputies is not so inconsistent as counsel's position would demand.

Again, section 2230, Compiled Laws of Alaska, abolishes a challenge to the panel or array, and defines a challenge such as is permissible under the code as an objection to a particular juror. What is the purpose of this abolition of a challenge to the panel or array if not to limit the parties to the action to the examination of individual jurrors in determining the qualifications of jurors? It is reasonable to conclude that Congress, by leaving out of the Alaska Code any provision for the summonsing of a special jury by any person other than the marshall and by enacting said section 2230, intended to deny to litigants the privilege of questioning the manner of summonsing such jurors.

Counsel for plaintiffs in error, cite Koontz vs. State,

10 Okla. 553, Ann. Cas. 1916 A 689, and Harjo vs. U. S. 98 Pac. 1021, both Oklahoma cases, in their argument upon this point, but they fail to point out the fact that Oklahoma has a statute providing that an officer is disqualified to summons a special venire by any *bias* that would disqualify him to act as a jurror in such case. There are many of the states which have a similar statutory provision including California and North Dakota. It follows that in such states a summonsing officer may be disqualified to summons a special venire by being a witnes for the prosecution or by having formed or expressed an opinion of the guilt of the defendant, but such cases have no persuasive force in jurisdictions *where no such statute exists.*

Counsel likewise cite the Editor's note appended to Koontz vs. State in Ann. Cas. 1916 A. 693, an examination of which will disclose a statutory provision as the basis for disqualifying summonsing offices of special venires in every case in which the basis of the ruling is disclosed. Said note cites several decisions opposed to counsels contention and none supporting it, to-wit:

Com. vs. Pasco, 39 Pa. Super. Ct. 163.
State vs. Hayes, 23 S. D. 596, 122 N. W. 652.
Sullivan vs. State, 75 Wis. 650, 44 N. W. 647.
Mabry vs. State, 50 Ark. 492, 85 S. W. 823.

We contend, therefore, that the marshal was not dis-

qualified, and if he had been, the trial court was without authority to appoint an elisor. The court has such power in Alaska only in civil cases for the purpose of serving the summons. (See section 877, Compiled Laws of Alaska.)

And again there is no claim that the plaintiffs in error were prejudiced by the marshal in the summonsing of the jurors of the special venire. It is true that counsel for defendants offered to exercise a fourth peremptory challenge but in so doing counsel stated that he made the offer by reason of the court's refusal to sustain counsel's challenge for cause to juror Pearson, and further in making said offer counsel did not designate which jurror he desired to challenge peremptorily, and therefore we can not say whether it was one of the *original panel* or one of the *special venire,* whom counsel wished to excuse. In speaking of the action of the sheriff in summonsing the jurors on a *special venire* in re State vs. Casedy (Oregon) 115 Pac. 287, 291 par. 5, Mr. Justice Burnette said:

> "We must presume that his official duty was regularly performed. The end to be obtained is an impartial jury, and this is finally determined by the examination of the men themselves under the sanction of the court at the trial of the cause."

For these reasons the error, if any, was harmless.

PARAGRAPH IV.

(Assignment of Error No. X and XI.)

The examination of W. H. Pearson on his *voir dire* is long (Bill of Ex. pages 51 to 62 of transcript) and some of his answers are more or less inconsistent. It is apparent, we think, that he did not make the nice distinctions in reference to the burden of proof and presumption of innocence that a lawyer would make. His examination discloses that he had never sat on a jury in a criminal case; that he had an opinion based upon the general reputation of some of the defendants; that his opinion was fixed but that he could and would lay it aside and try the case fairly and impartially upon the evidence produced upon the trial under the instructions of the court. He says in one place (page 59 of transcript) that he does not think that he would be satisfied to be tried by a juror of his frame of mind if he was one of the defendants, and that he does not think it would be fair to be tried by a jury in his frame of mind, but in the next three questions counsel for plaintiffs in error repeat in effect the same questions and elicit decidedly oppisite answers. He says that if every juror had his opinion and would go according to the evidence he would call that a fair trial. And when the question is repeated to him for the third time, he says that he would be saisfied to be tried by a jury with his opinion if he could prove that he was innocent. He is then

asked if the defendant should be required to prove that he was innocent, and he answers no and says that he is not in a frame of mind that would require the defendants to do so. It is evident that he was either confused in his answers or that he means that he would be satisfied to be tried by a jury of his own frame of mind if *he was innocent* but not if he was guilty. An innocent defendant wants only fair jurors, but a guilty defendant does not want fair jurors. The hope of the guilty defendant lies in the *unfairness* of the jurors. Hence, if Mr. Pierson were in defendant's position he would want a fair jury, if he were innocent. He says if he could prove himself innocent, which to him evidently means the same thing, because he says (near bottom of page 59 of transcript) that the burden was not upon the defendant to prove himself innocent and that he would not require the defendant to do so. The Court knew Mr. Pearson well and knew him to represent the very highest type of American citizenship. The Court questioned him (page 56 of transcript) as to his ability to give the defendants a fair and impartial trial, and being satisfied from his examination and from his appearance, manner, tone, and character as exhibited under examination that the juror was qualified, denied the challenge, whereupon the defendants, plaintiffs in error herein, peremptorily excused the juror.

The law governing challenges to jurors in criminal cases in Alaska is found in sections 2232, 2234, 2236,

2240, 2241, 2273 and 2274 of the Compiled Laws of Alaska and was taken practically verbatim from the statutes of Oregon, being sections 183, 185, 187, 192, 193, 230 and 231 of Hill's Code, or sections 119, 121, 123, 128,129, 169 and 170 of Lord's Oregon Laws. The opinion of the Oregon Supreme Court, therefore, is pertinent in considering the ruling of the trial court upon the challenge to the venireman, Pearson.

In State vs. Savage, 36 Or. 191, 202, paragraph 5, that court had under consideration an identical case, which will appear from that part of said decision here quoted:

> "John Adams, having been selected as a juror by Sheriff Driver upon a special venire, said upon his voir dire examination that he had read in the Daily Chronicle an account of the defendant's preliminary examination, had heard the matter very freely discussed, and had talked about the case; that as to the guilt or innocence of the defendant he had a pretty well settled opinion which it would require evidence to remove; and in answer to the question, 'You feel that you would not be a fair and impartial juror?' he said, 'No, I do not think I would.' On cross-examination, however, he said he did not think that the paper purported to publish the questions propounded to the witnesses, nor the answers which they gave; that such newspaper report could not be taken nor relied upon at the trial as sworn testimony, against which it would have no weight; that,

if accepted as a juror, he would base his verdict entirely upon the testimony given at the trial; and in answer to the question, 'Would you have any trouble in laying the newspaper report aside, and basing your verdict on the sworn testimony?' he said, 'No.' The court having overruled the challenge for cause, accepted the juror, and the defendant excepted. Our statute provides that on a trial of a challange for bias, if it should appear that the juror challenged has formed or expressed an opinon upon the merits of the case, from what he has heard or read, such opinion is not sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror can not disregard such opinion and try the issue impartially: Hill's Ann. Laws, par. 187. In the trial of a challenge for actual bias, the court below, having heard the testimony of the juror, and noted his manner and bearing while under examination, is much better able to judge of his power to disregard any opinion he may have formed or expressed from what he has read or heard than is an appellate court from an inspection of the transcript containing the questions propounded and the answers thereto. It may be that, not desiring to serve as a juror, he will, as far as possible, seek to magnify his preconceived opinion, hoping thereby to escape the duty which the law enjoins upon him; but having said that he can lay aside such opinion and try the case impartially, and the court being vested with discretion in such cases, its decision will not be reviewed, except for a manifest abuse thereof; State vs. Saunders, 14 Or. 300 (12 Pac. 441);

> Kumli vs. Southern Pac. Co. 21 Or. 505 (28 Pac. 637); State vs. Brown, 28 Or. 147 (41 Pac. 1042); State vs. Kelly, 28 Or. 225 (52 Am. St. Rep. 777, 42 Pac. 217); State vs. Steeves, 25 Or. 85, (43 Pac. 947); State v. Olberman, 33 Or. 556 (55 Pac. 866). Not being able to discover any abuse of such discretion, the action of the trial court in accepting said jurror will not be disturbed.

We submit that the ruling of the trial court upon the qualification of venire-man, Pearson, should not be disturbed.

Again, the ground of challenge to said Pearson is "for cause." (Transcript, page 54).

Section 2274 of the Compiled Laws of Alaska provides:

> "That the point of the exception shall be particularly stated . . . ."

In Southern Pac. Co. vs. Rauh, 49 Fed. 696, this court had under consideration an identical ground of challenge to a venireman under the Oregon statute, from which the Alaska statute was taken. Mr. Justice Morrow wrote the opinion of this court in that case and at page 700 of said opinion used this language:

> "There is still another reason why the ruling of the court upon the challenge to the juror can not be disturbed. The challenge was for cause, without

> further statement or explanation as to the particular ground of challenge. This is not sufficient. The ground of the challenge must be specifically stated. This is the requirement of section 231 of the Oregon Code of Civil Procedure providing that 'the point of the exception shall be particularly stated.' "

The ground of challenge was therefore insufficient and for that reason the ruling of the trial court in overruling said challenge was a proper exercise of his judicial discretion.

After the jury was completed but before it was sworn, counsel for plaintiffs in error made the following offer:

> "At this time in view of the court overruling my challenge to the juror Pearson, the defense offers to exercise another peremptory."

This offer was denied by the court. Was this offer sufficient? It would seem that the offer should have designated the particular juror against whom the peremptory would be exercised. "A peremptory challenge is an *objection to a juror* for which no reason need be given, but upon which the court shall exclude him," Compiled laws of Alaska, Sec. 2231.

The transcript, pages 50-63, discloses that all jurors who sat on the trial of this case were "passed for cause."

Hence it can not be claimed that an objectionable juror was forced upon the plaintiffs in error by reason of the trial court's ruling upon venireman Pearson. It may be admitted that plaintiffs in error exercised all of their peremptory challenges, but it does not follow therefrom that the trial jurors were not each and all perfectly satisfactory to plaintiffs in error. It will not be assumed that a ruling was prejudicial, it must affirmatively so appear. Is the offer of counsel for plaintiffs in error to exercise another peremptory any evidence that there was an objectionable juror on the jury? Particularly, when the objectionable juror, if any, is not pointed out, and the reason assigned is not that there is an objectionable juror remaining on the jury but that the court had previously overruled the challenge to "juror Pearson." The reason assigned is not a reason, but a *pretense* only. It discloses not only the want of an objection to any juror remaining on the jury but also the evident purpose of *creating* the ground for a review by this court of the ruling of the trial court on the challenge to juror Pearson.

We say *create* because it must be apparent that no real objection to any member of the trial jury existed on the part of plaintiffs in error.

As authority for our statement that it must appear that some objectionable juror was retained upon the

jury, we quote from Thompson on Trials (2nd Ed.), Section 115:

> "Some courts, therefore, hold that it is enough in such juncture, to show that his peremptory challenges were exhausted before the jury was sworn. But others take what seems to be the better view, that it must also appear, not only that his peremptory challenges were exhausted, but that some objectionable person took his place in the jury, who otherwise would have been excluded by a peremptory challenge."

This *"better view"* is supported by the great weight of authorities and is ably advocated by the Supreme Court of Utah in re State vs. Thorne, Ann. Cas. 1915 D, 90, 95, where an exhaustive note will be found giving the decisions pro and con and where it is said in the opinion:

> "The whole question of whether there is prejudicial error turns on whether prejudice will be presumed from the mere fact that the appellant was compelled to exercise one of his peremptory challenges to remove a juror whom he had chalenegd for cause, and who should have been removed upon the latter challenge, or whether in order to show prejudicial error, the appellant must make it appear that an objectionable juror was forced upon him after his peremptory challenges were exhausted, as aforesaid. If prejudice is presumed, it must be based upon the mere fact that

the appellant was required to remove a juror by the exercise of one of his peremptory challenges, when the juror should have been removed upon the challenge for cause. To follow such a course is to lose sight of the fact that all that one who is on trial for a crime is entitled to is a fair and impartial jury, and that the right of challenge is given for the sole purpose of reaching that result. This is illustrated in one way by the fact that a defendant may and often does waive one or more of his peremptory challenges. He does so whenever he is satisfied with the jurors in the box, or is not certain that he can obtain others more favorable to his cause. This may occur when he has exercised his last challenge just as well as when he has exercised his sixth, tenth or twelfth challenge. The mere fact, therefore, that one on trial for a crime was compelled to challenge a juror peremptorily, when such juror should have been removed for cause, cannot give rise to a presumption that an objectionable juror was subsequently placed on the jury in the place of the one that was challenged."

"In this case there was but one juror to be selected when appellants last peremptory challenge had been exercised. To the person who was called as the twelfth juror, there was no objection for cause or otherwise. If appellant had any personal or other objections to the juror, he should have indicated it then and there. True, counsel says that the *voir dire* examinations of the last juror disclosed no cause for challenge, and, in view

that the court had previously announced that appellants peremptory challenges had been exhausted, counsel had no alternative save to accept the juror. But if the last juror was a fair and impartial juror, and one against whom there was no objection, how was appellant prejudiced? If there was any reason why the twelfth juror was not impartial, or if appellant had discovered any reason why any one or more of the eleven jurors that had already been passed and accepted by him were unfair, he should have made the fact apparent to the court, and should have stated the grounds of his objections. It cannot be doubted that the court, in its discretion could have removed any objectionable and unfair juror at any time before the jury was finally sworn to try the cause, notwithstanding the fact that all of appellants peremptory challenges had been exhausted. Is it not clear that the situation so far as prejudicing the appellant is concerned is precisely the same as though he had waived his last peremptory challenge? As the matter now stands the record discloses that the appellant was tried by a fair and impartial jury, and that he at no time objected to any one of them, or intimated that he was forced to accept an objectionable juror after he had exhausted his peremptory challenges. Under the circumstances disclosed by this record, there is, therefore, absolutely nothing upon which to base a presumption of prejudice, even though we were inclined to adopt the rule that in such cases prejudice will be presumed, which we are not. We think that the only safe and rational rule is the one set

forth in the quotation from Thompson and Meriam, *supra.*"

It becomes pertinent therefore to inquire, *what is an objectionable juror?* We find a lucid answer in Carter vs. State, 45 Texas Crim. Rep. 430, 432, 433, in a very similar case to the case at bar in which the court says:

"The state has made a motion for a re-hearing, and contends that the court is in error in the original opinion in regard to the formation of the jury which tried appellant. We held that the jurors Foster, Barlow and Floeck were not qualified jurors because they had not paid their poll-tax; and we further held that inasmuch as appellant was forced to challenge these jurors, and so exhausted his peremptory challenges, the court erred in forcing the juror McNeal on appellant, on his objection urged to said juror. On the first proposition we adhere to our original holding. Our attention was not specially drawn to the shape in which this bill presented the question as to the juror McNeal. Appellant assigned no cause or objection as to this juror; simply objected to him. So far as this record is concerned, as shown by this bill, McNeal was a qualified juror and no fact or circumstance was shown, as to him, which suggested that he was not absolutely fair and impartial. In the motion for rehearing our attention is drawn to the fact that appellant simply objected to this juror without stating any ground of objection or any circumstance which rendered him an unfair or partial juror; and

a long line of authorities is cited in support of the proposition, beginning with Loggin's case, 12 Texas Crim. App. 65, and coming down to the present time, to the effect that, before a case will be reversed because of some improper action of the court overruling a challenge to a particular juror, it must be shown appellant exhausted his challenges, and that some objectionable juror was thereafter forced upon defendant. In Hudson's case, 28 Texas Crim. App. 323, an objectionable juror was said to be one against whom some cause for challenge exists, such as would likely affect his competency, or his impartiality during the trial; and these authorities are reconcilable with Keaton vs. State, 40 Texas Crim. Rep. 139, for there at least three jurors who had formed opinions, and as to whom it was proposed to prove the opinions so formed were against the appellant, sat in the case over his objection. This is what we understand to be meant by an objectionable juror; that is, one against whom some ground or cause, such as the formation of an opinion, or some prejudice, which might be ground of challenge, and would tend to show that the juror was not absolutely fair and impartial. But in this particular case no such ground was assigned. The juror was merely objected to. Upon such showing, we hold, in accordance with the unbroken line of authority, that the court did not commit any error in the formation of said jury, and in refusing to stand the juror McNeal aside, no ground of objection being urged as to him which

suggested that he was not a fair and impartial juror."

There is not one word in the record in the case at bar that would indicate that any one of the jurors who tried the case was objectionable in any respect to the plaintiffs in error. No expression even suggesting an objection to any of them was ever made. Not a man remained on the said jury to whom plaintiffs in error objected. In what way, then, have they shown prejudice? If any juror had been unfair or partial, that would have been developed in their voir dire examinations and shown by the record. But the opposite is shown, and in the face of this record, certainly this court will not indulge in a *presumption* of *prejudice*. Particularly since no *presumptions* of prejudice are indulged in on appeals from Alaska.

In Hayes vs. Missouri, 120 U. S. 71, it was said:

> "The right to challenge is the right to eject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained."

This statement was approved in Ex parte Spies, 123 U. S. 131, after which it is said:

> "We are therefore confined in this case to the rulings on the challenges to the jurors who actually sat at the trial."

There is another principle of law to which we now desire to direct the attention of the court, although it is alike pertinent to the subject discussed in Paragraph III herein, to-wit:

That an appellate court will not reverse a case on appeal for an error in the selection of a jury where the evidence discloses that no other verdict than guilty could have been legally returned. We direct the attention of this court to the authorities cited under Points and Authorities XI herein and quote from State vs. Thorne, supra, as follows:

> "In addition to the foregoing, we remark that we have carefully examined the whole evidence preserved in the bill of exceptions, and there is absolutely no dispute nor conflict with regard to any fact relating to appellant's guilt. That the appellant shot and killed the deceased, and that he did so for the purpose of and while perpetrating robbery is established beyond all possible question of a doubt. Indeed, no juror could have rendered a verdict other than guilty without violating his oath. As was said in Sullins vs. State, 79 Ark. 127, 95 S. W. 159, 9 Ann. Cas. 275, where the proof is such that no other verdict save one of guilty is legally permissible, courts will not reverse a case because some complaint is made against a juror or some of the jurors."

The record contains all of the evidence in the case at

bar and we invite the attention of the court to the same. Not a word of the material evidence in the case is disputed or denied by the defense or any attempt made to dispute or deny the same. The verdict was the lightest possible under the evidence, consistent with the oath of the jurors. Can this court say under the evidence that a jury had a legal right to return any other than a verdict of guilty? If not, any error that may have been made in selecting the jury is not prejudicial and does not constitute a legal reason for a reversal of this case.

PARAGRAPH V.

(Assignment of Error No. XIX.)

This assignment is based upon the exclusion of certain immaterial and irrelevant matters by the court *sua sponti.* We question the good faith of this assignment. Counsel disclose their purpose in their claim that the answers of the witness disclose a hostility to the plaintiffs in error. Now the facts are that the witness and attorney O'Neill are *persona non grata* to each other. The manner of counsel toward the witness was just as hostile as the manner of the witness toward counsel. In fact the hostility was mutual. After it had proceeded as indicated, the court stopped it of its own motion.

PARAGRAPH VI.

(Assignment of Error No. XX.)

The alleged gambling took place on January 5, 1916. It was shown by city patrolman, Wm. Dougherty, that in October previous, the defendant, Ed Johnson, had stated in his presence that he, Johnson, intended to gamble. The court admitted this testimony over the objection, that such statement was too remote, by counsel for defendants in said trial, and overruled a motion to strike it out, based on the same reason. On cross examination witness said that Johnson told him that that (gambling) was his way of making a living (page 95 of transcript). By instruction No. 9, this testimony was restricted in its application to the defendant, Johnson. His statement was in the nature of an admission against his interest and was certainly admissible for that purpose.

PARAGRAPH VI CONTINUED.

(Assignment of Error No. XXI.)

Over the objection of counsel for plaintiffs in error the court permitted the witness, N. B. Nelson, to testify that he reported to deputy marshal, Holland, that there was gambling down at the Arctic Billiard Hall and he could get them and then he (witness) went back and

got into the game. This was only preliminary and had already been testified to in effect by deputy marshal, Holland (page 72 of transcript) without objection thereto.

PARAGRAPH VI CONTINUED.

(Assignment of Error No. XX.)

A leading question was asked the witness, Nelson, by the U. S. Attorney for the purpose of identifying one of the defendants (neither of the plaintiffs in error), which was permitted by the court over the objections of counsel for plaintiffs in error. Under section 1496 of Compiled Laws of Alaska leading questions are permissible in the sound discretion of the court. Otherwise, the error, if any, is harmless, as the defendant so pointed out was acquitted by the jury.

PARAGRAPH VI CONTINUED.

(Assignments of Error Nos. XXIII, XXIV and XXV.)

These assignments of error pertain to other occasions on which gambling had been carried on at the same place. United States Attorney stated to the court (transcript,

page 99) that this testimony should be confined to the owner and proprietor of the building. And by instruction No. 8, such testimony was restricted to the purpose of establishing knowledge upon the part of the owner and lessee of said building that gambling was being carried on there. For this purpose this evidence was unquestionably relevant. Mr. Wharton, in his work on criminal evidence (10th edition), section 35, says:

> "Evidence of collateral offenses often become relevant where it is necessary to prove *scienter,* or guilty knowledge, even though the reception of such evidence might establish a different and independent offense."

PARAGRAPH VI CONTINUED.

(Assignments of Error No. XXVI, XXVII and XXVIII.)

Under section 1508 of the Compiled Laws of Alaska:

> "It is the right of the witness to be protected from irrelevant, insulting, or improper questions, or from harsh or insulting demeanor."

The trial court acted timely and properly in protecting the witness, Nelson, from the epithets of "stool-pidgeoning" and "gum-shoeing."

PARAGRAPH VII.

(Assignments of Error No. XXIX, XXX and XXXI.)

On the corss examination of the witness, Nelson, by counsel for the defendants (plaintiffs in error herein) he was asked certain questions concerning what he had sworn to at the former trial. The United States Attorney objected to the questions for the reason that the testimony of the witness at the former trial had been reduced to writing and signed by the witness, and that such writing must be exhibited to the witness before questioning him as to the substance of his former testimony. Whereupon the following colloquy occurred (page 106 et seq. of transcript):

> "MR. GRIGSBY: I have a right to call his attention to any former statements made by him at any time or place which may be inconsistent with his present testimony. It has no reference to any written document. I may want to use that paper to impeach him and it would destroy our purpose to let him read it over and fortify himself against my questions. The statements were oral, they were not in writing, the District Attorney had them transcribed afterwards.
>
> MR. SAXTON: If the court please, that section there was taken from the Oregon law. The purpose of this question is certainly to lay a founda-

tion for impeaching the witness, otherwise it has no purpose at all.

MR. GRIGSBY: Certainly that is the purpose of it.

* * * * *

MR. SAXTON: Was your testimony at the former trial transcribed, and have you read and signed it?

THE WITNESS: I have.

MR. SAXTON: And you found it correct?

THE WITNESS: Yes sir."

Whereupon, the court refused to permit counsel for defendants to interrogate the witness as to his statements in his former testimony without first exhibiting to the witness such testimony. Counsel for defendants complied with the ruling of the court and so exhibited the testimony to the witness, but assigns the ruling of the court as error. Was not his compliance with the ruling of the court a waiver of his exception? Be that as it may, the ruling of the court was correct.

Section 1502 of the Compiled Laws of Alaska provides:

"A witness may also be impeached by evidence that he has made at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing they shall be shown to the witness before any question is put to him concerning them."

This section was taken from the Oregon statute, being section 864 of Lord's Oregon Laws or section 841 of Hill's Code, and was adopted by Congress as a part of the Alaskan Code on June 6, 1900. Prior to this date, this section had been construed by the Oregon Supreme Court in State vs. Stevens, 29 Or. 85, 101, par. 5, in an opinion by Mr. Justice Moore in which he says:

"It is admitted that the court at the trial of Kelley on this indictment refused to permit his alleged statements to be given in evidence, for the reason that they had not been voluntarily made, and that they were admitted in this case for the purpose of contradicting Kelly only. It is manifest that these statements were made in the presence of the chief of police and others, and, being reduced to writing, were signed by Kelly, but they were not shown to him before he was interrogated concerning them, as required by the provisions of section

841, Hill's Code of Oregon. The reason assigned for not showing the writing to Kelly when called as a witness, as we gather it from the record, is that the statements were orally made by him to others before being reduced to writing, and therefore it was unnecessary to exhibit it to him. Kelly made the alleged confession for the purpose of having it written by the District Attorney, and the statements therein contained must have been orally made before being written; but when he signed the confession he adopted the language there used, and made it his own as much so as if he had personally written it. This being so, by what authority could Kelly be interrogated as to the contents of the writing until it was shown to him? The object sought by the statutory requirements, as we view it, is to refresh the memory of the witness, and, his statements being in writing, that end could be best attained by submitting the manuscript to him for inspection. The fact that the statements were made in the presence of others before being written can not change this rule, otherwise the writing could be wholly disregarded, and evidence of the oral statements as remembered by the person who heard them could be substituted therefor. Oral statements intended to be reduced to writing, when committed to paper and signed by the person making them, are supplanted, and must of necessity be excluded, by the writing, and, even if the writing in this case could have been admitted for any purpose, it was error to interrogate Kelly concerning the statements therein without having first shown it to him:

People vs. Nonella, 99 Cal. 333 (33 Pac. 1097); People vs. Ching Hing Chang, 74 Cal. 389 (16 Pac. 201)."

Again in State vs. Crockett, 39 Or. 76, paragraph 1, Mr. Chief Justice Bean cites the foregoing opinion with approval and says:

"Upon the trial, Earl Crockett and Ella Anderson were called as witnesses, and gave evidence on behalf of the state. On cross examination they were asked if they did not make certain statements when testifying before the coroner's jury. Thereafter the defense, without showing the witnesses the testimony given by them at the coroner's inquest, which had been reduced to writing, offered it in evidence for the purpose of impeaching them, but the trial court refused to admit it. The deposition or testimony of a witness given before a coroner is prima facie evidence of what the witness swore to, and, when the proper foundation is laid, is admissible for the purpose of contradicting him: People vs. Devine, 44 Cal. 452. But, where it is sought to impeach a witness by written statements, they must be shown to him before any question is put to him concerning them: Hill's Ann. Laws, par. 841. And this rule applies to testimony in a judicial proceeding, reduced to writing and subscribed by the witness: State vs. Stevens, 29 Or. 85, 102 (43 Pac. 947); People vs. Ching Hing Chang, 74 Cal. 389 (16 Pac. 201); Simmons vs. State, 32 Fla. 387 (13 South 890); State vs. O'Brien, 18 Mont. 1 (43

> Pac. 1091, 44 Pac. 399). It was not complied with in the case at bar, and hence there was no error in refusing to admit the testimony so offered.

Section 3380 of the civil code of Montana is identical with the statutes of Oregon and Alaska. In State vs. O'Brien, 43 Pac. 1091, 1093, Mr. Justice Hunt construes the statute in reference to the cross examination of a witness about the testimony of the coroner's inquest, which had been reduced to writing and signed by the witness, without first exhibiting the testimony to such witness. He held the same to be material error requiring a reversal of the case. After quoting the above section of the Montana statute he says:

> "No authorities are needed further than the statute itself. It is but the expression of the reason of judicial decisions for years and years. By disregarding its requirements, well established principles of the law of cross examination were violated."

PARAGRAPH VIII.

(Assignment of Error No. XXXIII.)

The stipulation whose admission is the basis of this assignment of error, particularly stipulates in express terms that it may be considered in evidence and read to the jury. No one can question the power of counsel

for the defendants in the trial below to enter into such a stipulation nor to bind their clients thereby. Can counsel now be heard to base an assignment of error upon a ruling of the trial court in conformity with their express stipulation? That would hardly be consistent with fair practice.

Again, is the stipulation immaterial? It at least accounts to the jury for the absence of witness Hanson and Adams whom the testimony had shown to have been present and engaged in the alleged gambling games. We deem it particularly potential in another respect but that will be considered later.

PARAGRAPH IX.

(Assignments of Error No. XXXIV and XXXV.)

Counsel for plaintiffs in error attempted to impeach the witness, Nelson, by showing inconsistent statements of an immaterial matter. On the objection and motion of United States Attorney, the court ruled such testimony out. This ruling is assigned as error. The rule seems to be well settled that a witness can not be impeached by proof of contradictory statements of an immaterial matter. Wharton's Criminal Evidence (10th Edition), Section 482 states the rule thus:

"A witness called by the opposing party can be

impeached by proving that on a former occasion he made a statement inconsistent with his statement made on trial, provided such statement is material to the issue; but where a witness has testified as to incriminating facts, he can not be asked whether or not he had previously stated that, in his opinion, the defendant was not guilty, for the purpose of impeachment, as a witness can not be impeached on an immaterial matter. The statement upon which it is intended to contradict must involve facts in evidence, and the varying statements sought to be shown must be relevant to the issue."

PARAGRAPH X.

(Assignment of Error No. XXXVI.)

The motion to direct a verdict of not guilty was properly overruled. The question of whether or not the detective was an accomplice with the defendants was submitted to the jury which was as favorable to the defendants as the evidence would warrant. However, every element of the offense was proven by competent evidence bearing out the testimony of the detective, Nelson. Witnesses, Miller and Holland, testified to every element of the offense, except the value of the chips played for. And the printing on the chips themselves showed their value "in trade."

Again, the only element of a crime concerning which

the testimony of an accomplice must be corroborated is *connecting* the *defendant with the crime.* The corroborating evidence was ample on that element.

PARAGRAPH XI.

(Assignment of Error No. XXXVII.)

In support of their plea of "former jeopardy," the defendants at the trial offered in evidence a certified copy of the transcript of the proceedings in the United States Commissioner's Court for Cape Nome Precinct in which said defendants were held to await the action of the grand jury, upon the theory, we suppose, that said transcript discloses a *trial* of the said defendants in the *justice's court* instead of a *preliminary hearing* in the *Commissioner's Court.* The court sustained the objection of the United States Attorney to the testimony, and such ruling is assigned as error. It must be apparent to any one examining said transcript that nothing in the nature of a *trial* occurred. The question was raised persistently by counsel for the defendants therein by offering to plead "not guilty" and by demanding a jury trial, but the Commissioner just as persistently refused to do anything of the kind, holding (transcript 130, 131):

> "That the court was, under the information filed in this case, sitting in the capacity of a U. S. Com-

missioner as committing magistrate and not as ex-officio Justice of the Peace with jurisdiction and power to try and determine the case."

Said transcript discloses that the proceeding was initiated by the filing of an *information,* not a *complaint;* that said information was filed in the *Commissioner's court,* not in the *justice's court;* that the commissioner acted as a committing magistrate and followed the procedure as such; that the commissioner refused to allow the defendants to plead and declined to follow any of the procedure of a *trial* in the *justice's court;* and that the judgment rendered was that of a *committing magistrate* and not that of a *justice of the peace.* By what school of logic then do counsel for plaintiffs in error claim that the defendants in the court below were *tried* in the justice's court? The proceeding was not initiated in the *justice's court,* the defendants never appeared in the *justice's court,* and no proceedings were at any time had or taken in the *justice's court.* Counsel for plaintiffs in error might contend that the proceedings should have been initiated and conducted in the justice's court but there is no ground for the contention that *such was done.* The said transcript discloses the contrary and was therefore properly excluded by the trial court. It *disproved "former jeopardy"* instead of tending to prove it.

Counsel for plaintiffs in error have cited Brown vs. State (Ala.), 16 So. 929, as decisive of this point; but

one quotation at page 930 of the opinion in that case shows how inapplicable it is to the case at bar, to-wit (Italics ours):

> "It was beyond the power and jurisdiction of the justice, *after trial had,* to merge the several petit larcenies, to make one grand larceny out of them, *as he attempted to do,* and bind the defendant over for that offense."

It is evident from this quotation that proceedings were *initiated in the justice court* and a *trial had* and then the justice determined to change to a *preliminary hearing*. As already pointed out, nothing of the kind happened in the case at bar.

Counsel for plaintiffs in error may contend that the commissioner was without jurisdiction to act as a committing magistrate in case of a misdemeanor, but that is beside the question. What the commissioner may have done *extra jurisdictionally* is no proof that he did something else as a *justice of the peace.* But was the commissiioner without jurisdiction to act as a committing magistrate in this matter?

It will be conceded that the District Court and Justice's Court in Alaska have concurrent jurisdiction to try all misdemeanors, punishable by fine or imprisonment in jail, including gambling, and that neither has exclusive jurisdiction in such cases (see sections 363 and

2519 of the Compiled Laws of Alaska). There are, therefore, two courts open for the trial of misdemeanors in Alaska. Who has the *option* of choosing the forum? The plaintiff or the defendant? When the defendant is brought into one of these courts can he be heard to say: "I prefer to be tried in the other?" Both reason and practice say no; the plaintiff chooses the forum, and so long as he chooses a forum which has jurisdiction, the defendant can not be heard to complain.

Now, when the United States Attorney decides to prosecute some one for a misdemeanor in Alaska he not only has two forums from which to choose, but he has at least three different methods of procedure from which to select the one he may determine to follow: (1) He may file a *complaint* in the *justice's court* under section 2521 et seq. Compiled Laws of Alaska, and try the case either before the justice or a jury subject to appeal by defendant to District Court. (2) He may wait until the grand jury is in session and initiate the proceedings before the grand jury, and by this method secure an indictment in the District Court under section 2123 of the Compiled Laws of Alaska. (3) He may elect to file an *information* before the United States Commissioner or District Judge invoking his jurisdiction as a *committing magistrate* under sections 2379 and 2383, Compiled Laws of Alaska, and upon a preliminary hearing before said magistrate, have the defendants held to the District Court, as was done in the case at bar.

There are only two classes of officers empowered to act as committing magistrates in Alaska, to-wit: District Judges and U. S. Commissioners (see section 2381, Compiled Laws of Alaska).

A United States Commissioner in Alaska is a very composite official. He is not only a fully empowered United States Commissioner with the additional duties of a committing magistrate and coroner thrust upon him (Sections 366, 2381 and 2473, Compiled Laws of Alaska), but he is *ex-officio* justice of the peace, recorder and probate judge. His powers and duties as a commissioner are just as distinct from his powers and duties as a justice of the peace, recorder or probate judge, as they would be if each of these offices were held by a different official. A commissioner is empowered to do certain things as such among which is the power to act as a committing magistrate; certain other things as a justice of the peace among which is to try defendants charged with certain misdemeanors and certain other duties as probate judge or recorder. In order to invoke his powers as a commissioner, magistrate or coroner, proper proceedings must be instituted and conducted in the commissioner's court; but if it is desired to invoke his powers as a justice of the peace or probate judge the proper proceeding must be initiated and conducted in the justice court or the probate court for that particular precinct. Hence a proceeding initiated in a commissioner's court is in a

different and distinct forum from one initiated in a justice's court, although the same individual presides over both courts. Therefore, in this case when the United States Attorney filed the information in the commissioner's court, such proceeding was in a forum that has no power *to try anybody for anything*. The jurisdiction of the commissioner as a magistrate was invoked and exercised and that jurisdiction only. The commissioner as such has no power *to try* cases; he can only hold to the District Court. No proceedings were ever initiated or had in the *Justice's Court* in this case, and as that is the only court outside of the District Court in which a *trial* could have been had, the defense of "former jeopardy" must fail.

By reason of the logic as well as the eminence as a jurist thereafter attained by the writer, we desire to quote from the dissenting opinion of Mr. Justice Brewer in ex parte Donnelly, 1 Pac. 783:

> "It is conceded that the district court has concurrent jurisdiction with justices of the peace of the offense charged against the petitioners and that the state has a right to elect in which tribunal it will prosecute. It is a general truth that where two tribunals have concurrent jurisdiction the plaintiff may elect in which he will prosecute, and choose for himself any mode of proceeding authorized by law, statute or common. In neither civil nor criminal cases is the tribunal or form of action selected by the

defendant; nor in case one tribunal has jurisdiction, and one form of action is authorized, can the defendant object on the ground that another tribunal has also jurisdiction, and that in a different form of action the litigation may be determined with less expense and in a shorter time. This, which is a general truth applicable to all actions, ought to be especially enforced where the state is the plaintiff and the action a criminal one. The state ought not to be hampered; it should have the privilege of going before any tribunal which has jurisdiction, and resorting to any mode of procedure which is authorized by statute * * * yet I am still constrained to think that a preliminary examination before a justice of the peace in cases of misdemeanor is authorized. By the code of criminal procedure paragraphs 2 and 3, all violations of law for which punishment is prescribed, are defined as public offenses and divided into the two classes of felony and misdemeanor. Article 5 of that Code provides for the arrest and examination of offenders. It authories the filing of a complaint before certain magistrates, the arrest of the party, his examination before the magistrate, and his commitment for trial at the court where he is to be tried. This article does not speak of felonies alone, but uses the general term 'offenses.' It does not commit such examinations to justices of the peace alone, but names, specifically, mayors, police magistrates, judges of the district and supreme courts. The fact that examination may be had before any other than justices of the peace, is also recognized by section 69. Sup-

posing a complaint for a misdemeanor were filed before a judge of the district court, can he hear the complaint? and if so, what must he do? He certainly has no power of final trial. The statute authorizes the filing of a complaint before him, and I know of no reason why he may not entertain jurisdiction; but his jurisdiction would be limited to a preliminary examination, and the binding the defendant over for trial at his court. The same jurisdiction in the matter of preliminary examination, and by the same section of the statute, is given to justices of the peace. Does the fact that they also have jurisdiction to try, oust them of jurisdiction to examine? I can not see the logic of that argument, nor can I see why, when the same section grants jurisdiction in preliminary examinations to judges of the district court and the justices of the peace, and a defendant brought before the former must submit to a preliminary examination, he can when brought before the latter, compel the justice to give up his jurisdiction in the matter of preliminary examination, and assume jurisdiction to try. It must be remembered, as I have already stated, that this Code of Criminal Procedure is the General Code. It is devoted specifically to matters of procedure, and therefore, in matters of procedure, should overpower any mere implications or inferences drawn from the language of other statutes. The same argument by which the jurisdiction of district courts in misdemeanors is sustainable,—that is the continuous and especially controlling operation of the statute concerning district courts in

> all cases not at the time specifically excepted therefrom—seems to me to sustain the jurisdiction of justices of the peace in matters of preliminary examination for misdemeanors. This Code of Criminal Procedure is continuous, controlling in all cases in which at the time there is no special statutory exception. Its language is general, and it is to be given a general application."

In their brief counsel attempt to break the force of U. S. vs. Folsom, 3 Alaska 226, by saying that that prosecution was under a "special statute," to-wit, Section 2583, Compiled Laws of Alaska. Now, said Section 2583, was enacted as a part of the Act of Congress constituting the Criminal Code and Code of Criminal Procedure, such Act being entitled:

> "An Act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district" (30 St. L. 1253).

Said section 2583 prescribes a method of procedure under *"this Act."* To what do the words, "this Act" refer? Unquestionally to the act of which said section constitutes a part. If so, the procedure prescribed by said section applies to every misdemeanor defined by the criminal code of Alaska, because the said criminal code constitutes a part of "this Act."

We submit the United States Commissioner in Alas-

ka has jurisdiction to act as committing magistrates in cases of misdemeanors.

(Assignment of Error No. XXXVIII.)

This offer was in the nature of a "josh," although that element of it is not apparent from the record. The "same objection" was made and upon looking back through the record it will be discovered the previous objection was "incompetent, immaterial, and irrelevent." The objection that should have been made is that *it was not the best evidence.* However, the rule of evidence is that a general objection, *if sustained,* is sufficient if there is *any* ground upon which the evidence might have been excluded. (See Wigmore on Evidence, Vol. 1, Section 18, page 59.)

> "So, too, a specific objection *sustained* (like a general objection) is sufficient, though naming an untenable ground, if some other tenable one existed." (See Wigmore on Evidence, Vol. 1, Sec. 18, p. 61.)

PARAGRAPH XII.

(Assignment of Error No. XL.)

This assignment will be discussed in connection with the LI assignment of errors in paragraph XXI herein.

PARAGRAPH XIII.

(Assignment of Error No. XLI.)

This assignment of error is based upon the giving of a part of instruction number 4. The exception is general and is therefore ineffective if there is any legal proposition therein correctly stated. There are at least three legal propositions in that part of said instruction excepted to, to-wit:

(1) "it is the duty of the judge of the court to instruct you upon the law applicable to the case.

(2) the statute makes it your duty to accept as law what is laid down by the court as such in these instructions and

(3) if you should knowingly refuse to do so you would be liable as for contempt of court."

Is there one of these three propositions that is unobjectionable? If so, no error can be predicated thereon. Section 2266, Compiled Laws of Alaska, *inter alia,* provides:

> "That although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound nevertheless, to receive as law what is laid down as such by the court;"

And, again, the *seventh* subdivision of section 2246 of the Compiled Laws of Alaska:

> "The court, after the argument is concluded, shall immediately, and before proceeding with other business, charge the jury;"

These excerpts from the Alaska Code of Criminal Procedure are sufficient upon this alleged error.

PARAGRAPH XIV.

(Assignment of Error No. XLII.)

This assignment is based upon a general objection to instruction No. 5½ given by the court upon the trial. This is a long instruction, containing over four hundred words and may be subdivided into as many as a dozen legal propositions. What has been said in reference to Assignment of Error No. XLI. applies with equal force here. A general exception brings nothing before this court for review. As was said by Mr. Justice Gilbert in Ball vs. United States, 147 Fed. 32, 43:

> "It (the exception) was directed to an entire paragraph, portions of which were not subject to objection, and it did not point out the defective portion, so as to bring it to the attention of the court, and thus afford an opportunity to remedy it. Such an exception will not be considered in an appellate court."

PARAGRAPH XV.

(Assignment of Error No. XLIII.)

The chips referred to in instruction 5½A are described on page 43 of the bill of exceptions and constitute "Plaintiff's Exhibit B." These chips are circular pieces of card board about 1½ inches in diameter and ⅛ inch in thickness, on which there was printed according to the color of the chip as follows:

On the white chips, "The Arctic, good for 12½c in trade, A. C. Laird, Prop."

On the blue chips, "The Arctic, good for 50c in trade, A. C. Laird, Prop."

On the red chips, "The Arctic, good for $1.00 in trade, A. C. Laird, Prop."

This instruction is excepted to on the ground that witness, N. B. Nelson, gave testimony in conflict with the statement in the instruction as to the value of these chips. Such testimony is found on pages 97 and 111 of the transcript. The chips were one dollar a stack. Five cents a piece for the white ones and 25c a piece for the red ones. But this is the *cash* price, what the witness and others paid for them in cash. The printing on the chips states the value *in trade,* and it is not contradicted by one word of the evidence either directly or indirectly anywhere in the record. The value *in cash* of

these chips is one thing, and the value *in trade* is another. There isn't even anything unusual about the fact that these chips should have a greater value *in trade* than *in cash*. One does not in any way contradict the other. The court, by this instruction, called the attention of the jury to this uncontradicted printed statement on these chips, in the nature of a written admission. The testimony of the witness Dean (transcript, page 84) shows that plaintiff in error Laird was the proprietor of the Arctic Billiard Hall and cigar store.

PARAGRAPH XVI.

(Assignment of Error No. XLIV.)

The execption to instruction No. 7 is general and is therefore insufficient. The instruction is long and contains at least four legal propositions. As to whether or not any of the propositions is without objections is answered by the authorities cited under Points and Authorities XX herein.

PARAGRAPH XVII.

(Assignment of Error No. XLV.)

Instruction No. 8 restricts the evidence of gambling at other times at the same place to the purpose of showing "scienter" on the part of the owner and lessee. The

exception is general. The testimony showed the plaintiff in error Johnson, was the owner of the building (transcript, page 93).

PARAGRAPH XVII CONTINUED.

(Assignment of Error No. XLVI.)

The same may be said of this assignment as of the last above. Instruction No. 9 restricted the admission of the defendant, Ed Johnson, to him, and advised the jury that such admissions *should not be considered* in determining the guilt or innocence of any of the other defendants.

The exception was general.

PARAGRAPH XVIII.

(Assignment of Error No. XLVII.)

This assignment of error is based on the refusal of the trial court to give the following instruction requested by defendants, to-wit:

> "You are instructed that a conviction can not be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendants with the commission of the crime, and the corroboration is not sufficient if

it is merely shown the commission of the crime or the circumstances of the commission."

This instruction was covered by instruction No. 5½, given by the court. It is a well established proposition of law that it is not error to refuse to give an instruction requested which is substantially covered by the general charge of the trial court. See authorities cited under Points and Authorities No. XXI.

PARAGRAPH XIX.

(Assignment of Error No. XLVIII.)

This instruction was substantially given in instruction No. 5½.

PARAGRAPH XIX CONTINUED.

(Assignment of Error No. XLIX.)

The instruction requested is objected to by reason of it misstating the charge in the indictment or rather by stating a part of the charge in a misleading way. It begins by saying:

> "The indictment in this case charged the defendants with having played certain games of cards for money at the time and place charged in the indictment."

What the indictment actually charged is that the

games were played *"for money, checks, and chips as representatives of value."* The difference is made of the greater importance by reason of the fact that the evidence showed that the games were played for chips as representatives of value, there being no proof or attempt to prove that the game was played for money.

And again the last proposition in said instruction, to-wit:

> "if you should find from the evidence that the witness, N. B. Nelson, was an accomplice and there is no other testimony in the case than his tending to prove that gambling actually took place, then it will be your duty to acquit the defendants."

is submitted to the jury upon the condition that there is no other evidence than that of N. B. Nelson that gambling actually took place. This ignores the testimony of A. B. Miller and Phil Holland and the chips constituting the government's exhibits B and D and the printed statement of the value thereof thereon. The remainder of the instruction requested was given substantially in instruction No. 5½.

PARAGRAPH XX.

(Assignment of Error No. L.)

This instruction was given by the court and is the second instruction numbered 6 (page 146, transcript).

PARAGRAPH XXI.

(Assignment of Error No. LI.)

This assignment is based upon the refusal of the court to give an instruction to the jury to the effect that they should not draw any inference prejudicial to the defendants from the refusal of Chas. Mason to testify on the constitutional ground of incriminating himself. The fortieth assignment may be considered in connection with the fifty-first. The witness was first called by the Government and refused to testify. Afterwards he was called by the defendants (plaintiff in error) and his testimony ruled out by the court. The offer as to what he would testify to did not include any explanation of the evidence connecting him with the game. He was an accomplice with the defendants. Undisputed evidence showed the witness to have been engaged in the game of pangingui at the time of the raid. He was arrested with the defendants but at the hearing he was not bound over to the grand jury. He was therefore a competent witness but refused to testify when called by the prosecution. Because the witness refused to testify, the inference that he was engaged in the game of pangingui is a legitimate inference. We may concede that it may not be proper to infer that the plaintiff in error were guilty because the witness had availed himself of his constitutional privilege to refuse to testify and thereby affirm or deny whether or not witness had been engaged

in a game of pangingui. We might even concede that such refusal by the witness would not justify the inference that plaintiffs in error were engaged in such game. The natural and proper inference is that the *witness* was so engaged. The jury is forbidden by statute (Sec. 2258 Compiled Laws of Alaska) to draw an inference against a *defendant* by reason of *defendant's* failure to testify, but there is no such statutory protection given a *witness*. "The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in this act" (Sec. 2257, Compiled Laws of Alaska). As stated above, there is *no statute* forbidding the natural and logical inference to be deduced from the refusal of a witness, who is an accomplice with the defendant to testify. Suppose this were a civil action against the defendants for the recovery of money lost at gambling, could it be maintained that the defendant's refusal to testify would not be a proper fact for the jury to consider, in determining whether or not gambling was going on at the time and place alleged? In such a case it would even be the duty of the court to instruct the jury:

> "Sixth. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore,
>
> Seventh. That if the weaker and less satis-

factory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be received with distrust." (Sec. 1505, Compiled Laws of Alaska.)

A defendant would not be compelled to give testimony incriminating himself in a civil case any more than in a criminal case. The protection of the constitution is equal in both cases. However, the protection stops there in the civil case, while in the criminal the statute throws another safeguard around the defendant by declaring that *the waiver of his right to be a witness* in his own behalf *shall create no presumption against him.* This latter protection does not extend to witnesses who are accomplices and who are not on trial. There is no analogy in this matter between a defendant in a criminal action and a witness in the same case. Such defendant is protected by *statutory* safeguards which such witness does not possess. If any analogy exists it is between a defendant in a civil action and an accomplice who is a witness in a criminal action. Both may avail themselves of the statutory privilege to refuse to give incriminating testimony but such refusal is a circumstance proper for the consideration of the jury.

What did the refusal of the witness, Mason, tend to prove? He was asked if he was present and engaged in a game of pangingui with defendants, Johnson et al, at the time and place alleged in the indictment. The

question could have been answered either "yes" or "no." If he had answered "no" there could have been no criminal liability, but if he had answered "yes," he would have been liable to a subsequent criminal prosecution. He refused to answer on the ground that his answer would incriminate him. The reasoning mind can draw but one conclusion: The witness was present and so engaged.

Why is this not a legitimate inference? There is no statute forbidding it and in the absence of statutory prohibition, the rules of evidence in civil actions apply. See authorities cited under Points and Authorities No. XXIV.

The evidence discloses that defendants, Johnson and Laird, were the owner and proprietor, respectively, of the Arctic Billiard Parlor, the place where the alleged gambling took place. As such owner and proprietor they became responsible for any gambling occurring therein with their knowledge. Hence, the inference that Mason was engaged in the game of pangingui in question was not necessarily an inference that defendants were engaged in said game but merely an inference constituting a link in the chain of evidence making defendants responsible for the game. If Mason was engaged in said game, defendants, Johnson and Laird, became liable when their knowledge was shown by other undisputed evidence.

Mason admitted that he was arrested with the defendants, refused to testify whether or not he was engaged at that time in gambling in a game of pangingui; other witnesses testified that he was so engaged; United States Attorney, in his argument to the jury, directed the attention of the jury to Mason's presence at the time of the alleged game and his refusal to testify, and the ground of his refusal, believing that the inference to be drawn therefrom was legitimate as well as irresistible, but alas, how frequently we misjudge the working of a juror's mind. The jury was not convinced, and after forty-odd hours of deliberation they determined that the alleged game of pangingui was a myth; that Mason's fears of incriminating himself were groundless, and that the comments of the U. S. Attorney upon Mason's refusal to testify were ineffectual; in fine, the jury returned a verdict of "not guilty" on the *second* count as to *all* the defendants. The alleged error was therefore harmless.

PARAGRAPH XXII.

(Assignment of Error No. LII.)

What has been said in reference to the fifty-first assignment of error, except that it does not appear *from the stipulation,* which game the witnesses were engaged in, might be repeated here. The stipulation sought to be eliminated specifies that it should be considered *in*

evidence and read to the jury. After counsel for defendants stipulated, that certain facts may be considered in evidence, can they be heard to restrict the application of such evidence? The time at which limitation should have been considered was when the stipulation was made. Having stipulated the facts set forth in the stipulation into the evidence without any restriction as to their application, defendants should not be heard to complain thereafter. If the facts restricted were immaterial for any purpose or material only for a particular purpose, counsel for defendants should have urged the same *in the stipulation.* Not having done so they waived any right they may have had in that respect.

We maintain, however, that the inference to be drawn by the jury from the refusal of the witness to testify is a proper one. These witnesses were accomplices and particeps criminis with the defendants. Where the witness is not an accomplice of the defendant but bases his refusal to testify on a separate and distinct crime from that on which the defendant is being tried, there would be no ground for an inference against the defendant. That is not the case in this instance. Hence the jury should be allowed to draw their own inference from the refusal. As Bayley, J., said of the defendants in R. vs. Watson, 2 Stark 153:

> "He may demur to the question for he is not bound to criminate himself; and if he refuses, this is

> not without its effect on the jury . . . It would perhaps be going too far to say you may discredit him if he refuses to answer; it is for the jury to draw whatever inference they may."

In Bishop's New Criminal Procedure (Second Edition), vol. 3 p. 1301, section 117, subdivision 3, we find this statement in reference to a bawdy-house:

> "*Refusal* to *Testify*—to conduct of the inmates and visitors, by witnesses who have frequented the house, on the ground that thereby they would degrade themselves, has been deemed proper for consideration by the jury," citing Clementine vs. S., 14 Mo. 112.

The principle involved here was decided adversely to the contention of counsel for plaintiffs in error in the case of Clementine vs. State, 14 Mo. 112, 115, where it appeared that certain witnesses who frequented a bawdy house refused to answer questions as to the conduct of inmates and visitors therein on the ground that their answer would tend to their own degredation. The court held that the refusal of such witnesses to so testify was a proper matter for the consideration of the jury and upon this point stated:

> "The exemption from testifying with which (in this case it was too broadly assumed) the law invests those who may probably be the only persons who can establish the fact direct, necessarily presupposes

> the admission of circumstantial testimony of the character objected to, of which it may be well to remark here as elsewhere, that the refusal of various witnesses to testify in the case, upon the ground that the answers to the questions which were propounded to them, would tend to their own degredation, might well be considered by the jury in making up their verdict."

Counsel for plaintiffs in error cite Beach vs. U. S., 46 Fed. 754, from which they quote in their brief, as being decisive of this point and as against our contention, but we do not so construe the opinion in that case. The eminent writer of that opinion was very careful to limit his conclusion to cases in which the witness had *no relations and was not a conspirator with the defendant nor charged in the same indictment.* The facts in the case at bar bring it within the exception mentioned in the Beach case. Here the witness was present when the offense was committed; was engaged with others in the commission of one of the offenses charged in the indictment; was arrested with the plaintiffs in error and other defendants below; was an accomplice, and particeps criminis with the plaintiffs in error although not a co-defendant. These facts were all disclosed by other evidence in this case.

Bearing in mind that the plaintiffs in error, Johnson and Laird, were the owner and proprietor respectively of the premises where this gambling took place,

and were present, knowing what was going on there, how could the reasoning in the Beach case apply? That opinion says:

> "If he (the witness) had testified his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant."

Not so in the case at bar if the witness criminated himself by testifying that he, the witness, was gambling he thereby established the fact that gambling was running for which Johnson as owner and Laird as proprietor were each responsible, and thereby established one element in the evidence of their guilt. Under the circumstance of the case at bar, it is impossible to imagine any testimony that the witness could have given favorable to the plaintiffs in error, if the witness criminated himself. Hence we aver that the opinion in Beach vs. U. S. is not only not against our contention in the case at bar, but inferentially supports our contention.

In People vs. Mannausau et al., 26 N. W. 797, also cited by plaintiffs in error, we find the facts essentially different from the facts in the case at bar. There the incriminating facts concerning which the witness refused to testify had no connection with the crime for which the defendants were being tried. Consequently an inference that the witness was guilty of the crime concerning which he refused to testify, would not in any way tend to prove

the guilt or innocence of the defendants of an entirely distinct and separate crime. Hence the reasoning of the Court in that case has no application to the case at bar.

As an authority for the consideration by the jury of inferences drawn from the failure of a defendant to testify as to incriminating circumstances and events already in evidence, in which he participated and concerning which he was fully informed, we refer to the recent decision of the United States Supreme Court in the Caminetti-Diggs case, 242 U. S. 470, 492-495, in which an instruction was approved which told the jury, that:

> "After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with which that trip was taken, contenting himself with merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration.

A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he fails to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusions as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

A proper deduction from the approval of this instruction would appear to be that the defendant can claim no protection, from inferences drawn from his failure to testify beyond the strict language of the statute. If he doesn't testify at all, the statute protects him, but if he testifies ever so liittle, there is no statute that gives him any protection whatever from the logical inferences drawn from his failure to testify fully.

The constitutional right of the witness not to criminate himself was intended for the protection of the witness and not of the defendant who happens to be on trial.

The witness may testify or he may refuse to testify, and in either case there is no statute giving the defendant any protection from the logical inferences to be drawn therefrom.

A similar principle was invoked in United States vs. Carter, 217 U. S. 286, 315-317, where it was said:

> "The significant fact remains that Robert F. Westcott, though the close friend, and, indeed the affectionate friend of his ex-son-in-law, Oberlin M. Carter, did not voluntarily appear before either of the military tribunals in his defense, and, figuratively stood by him and saw him sent in ignominy to serve a term of five years for having betrayed his trust. It is true that Captain Carter says that he did all he could to persuade Mr. Westcott to appear and testify. Nevertheless the failure of Captain Carter to secure his evidence, in view of their relation, justifies a presumption that it would not have borne out the defense."

PARAGRAPH XXIII.

(Assignment of Error No. LIII)

This instruction is given substantially in instruction No. 5. Almost identical instructions were given and requested in State vs. Megorden, 49 Or. 259, 270, par. 11, and in commenting thereon the court said:

"But it is claimed that this instruction did not go far enough, and that the court should have instructed the jury that the presumption of innocence continued until the jury reached a verdict. The instruction given was as broad in that respect as the one requested. The slight difference in the phraseology of the two instructions upon the presumption of innocence until the contrary is shown or proven beyond a reasonable doubt did not alter the meaning which was the same in each. If any difference existed it was in favor of the defendant in the last instruction given."

PARAGRAPH XXIV.

(Assignment of Error No. LIV)

This instruction makes an assumption contrary to the evidence in that it asks the court to instruct the jury that,

"no private person can hire another to participate in a criminal offense even though such participation be for the purpose of detecting other guilty persons and relieve such participant from criminal responsibility."

The only evidence on the point is that of E. R. Jordan, U. S. Marshal, as follows:

(Bill of Exceptions, page 91 of transcript.)

"Q. How did you employ Mr. Nelson and in what respect?

A. I told him to go down and look up any gambling and report to the office. I did that in my official capacity."

And, again, the instruction requested makes the status of a detective who participates in a crime depend upon whether or not he was employed by an officer or a private citizen. Such is not the law. The agency employing the detective has nothing to do with determining his status, that is as to whether or not he is an accomplice. It is the purpose and intention with which the detective participates in the criminal act that determines his status. If his purpose and intention is to detect and punish the offenders, then he is not an accomplice. His previous employment and reports to officials or to his employers are relevant and material facts by reason of their tendency to establish his purpose and intent. In this case the evidence tended to show that the witness, Nelson, was employed by the U. S. Marshal to look up gambling and report to the marshal's office. The marshal paid the witness out of his own, the marshal's, private funds, the witness entered upon his work, found gambling going on in the Arctic Billiard room, entered into the games and in less than a week reported to the marshal's office that the psychological moment had arrived for a raid; returned to the Arctic Billiard room and entered into the

game, and was so engaged when the marshal's force arrived. There was no evidence to the contrary. Under this evidence the court submitted the question of whether or not the witness, Nelson, was an accomplice to the jury in instruction No. 5½. This was certainly as favorable to the defense as the facts would warrant.

In State vs. McKean, 36 Iowa 343, after quoting from Rex vs. Despard, 28 Howell's St. Trials, 346 (i. e., 498), and from Commonwealth vs. Downing, 4 Gray 29, and Commonwealth vs. Villard, 22 Pick 476, the opinion says:

> "In the case under consideration the persons to whom the witness made the communications of his purpose to act the detective were not officers of law, or charged with any public duty to detect offenders. In this respect the case differed from Rex vs. Despard, supra. But this difference, perhaps, under our form of government and regime, would not be sufficient to defeat the application of the rule. The court left the credibility of the witness and the weight to be given his testimony to the consideration of the jury. Of these they were the proper judges. We do not see how we can interfere with the action of either the court or jury."

The instruction submitting the question to the jury in the above case of State vs. McKean was as follows:

> "If you find from the evidence that the witness

Meeks went into an arrangement with the defendant and others to steal the horse in question, and did assist in taking said horse, whether or not he is an accomplice in the crime, if any has been committed, will depend whether, at the time he took the horse, he took it with felonious intent, that is, with the intent to appropriate the horse to his own use and deprive the owner of the use thereof. 9th. If at the time of the taking he was actuated by, or possessed of, such felonious intent, he is then to be regarded as an accomplice; but on the other hand, if you are satisfied from the evidence that Meeks intended from the beginning to act the part of a detective to ferret out and make known the crime and secret frauds of the defendant and others, then he is not to be regarded as an accomplice. This question of whether Meeks was an accomplice or a detective is important, and must be by you determined in view of the next instruction which I shall give you. It is a question of fact which you are to determine from the evidence. 10th. If you find, under the instructions given above, that the witness Meeks was an accomplice, the laws of this state direct that a conviction can not be had upon the testimony of an accomplice alone, unless such testimony is corroborated by such other testimony as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof. But this rule of evidence does not apply if you find that Meeks was not an accomplice, but a detective."

PARAGRAPH XXV.

(Assignment of Error No. LV.)

After the jury had been out about forty hours they returned into court and reported that they could not agree upon a verdict. Whereupon the court read to them the following:

> "Gentlemen of the Jury: Upon the evidence and instructions in this case you should be able to reach a verdict.
>
> The evidence in this case is plain, and the law is plain as I have pointed out to you in my written instructions.
>
> Now I shall give you a longer time for a further and more serious consideration of this case. When you retire to the jury room again, read over the instructions of the court carefully and if there is anything about them you do not understand, so advise the Court and I will endeavor to make the same plain to you. It is your duty to arrive at a verdict in this case according to the evidence and instructions given you, irrespective of all other considerations."

To which instruction the defendants excepted on the ground that said instruction was "an attempt to influence the jury to return a verdict against their conscience,

the jury then having been deliberating for more than forty hours."

Remembering that a specific objection *overruled* will be effective to the extent of the grounds specified *and no further,* it becomes pertinent to consider the scope of defendants' exception.

The objection is that this instruction is an attempt to influence the jury to return a verdict against their conscience, not because they were told it was their duty to agree upon a verdict, nor because they were told that the evidence and the law were plain, but because *they had already been deliberating for more than forty hours.* This objection or exception merely challenged the right of the court to keep the jury together for a longer period of time. It called the attention of the trial court to the long time during which the jury had already been deliberaing and asserted that further deliberation would have the effect of coercing an agreement against the consciences of the jurors. There was no objection to the language of the court but merely to the act of sending them back for further deliberations.

This assignment of error therefore brings up the question of the power of the trial court to send back for further deliberation a trial jury who report their inability to agree on a verdict after having been out for forty hours. In Hyde vs. United States, 225 U. S. 347,383,

the action of the trial court was approved in sending a jury back for further deliberations not only once but twice after it had already been deliberating for three days and nights without agreeing on a verdict. That the time during which a jury shall be held together for deliberation is within the discretion of the trial court is too well settled to permit of argument. See authorities cited under Points and Authorities Nos. XXV and XXVI.

PARAGRAPH XXV—Continued.

(Assignment of Error No. LVI.)

This assignment is directed to the judgment entered in this case. Probably the purpose is to question that part of the judgment ordering the U. S. Marshal to destroy the gambling paraphernalia taken by the marshal into his custody and described in the judgment. This order is based upon section 416 of the Compiled Laws of Alaska (37 St. L. 512, Sec. 9) which provides, *inter alia*:

> "nor shall the legislature or any municipality interfere with or attempt in any wise to limit the acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States Marshal or any of his deputies, or any constable or police officer, and destroyed;"

This would appear to be ample authority for the order.

MISLEADING STATEMENTS.

In the last paragraph on page 57 of the brief of plaintiffs in error we find this statement:

> "Both Laird and Johnson were convicted on the second count in the indictment."

This is an erroneous statement of a fact. The verdict, which is set out on page 32 of the transcript and again at page 160 of the transcript, states that both Laird and Johnson were found *"guilty"* on the *first* count of the indictment, and *"not guilty"* on the second count.

The indictment, pages 1 and 2 of the transcript, discloses that the first count charged "stud-poker" and the second count pangingui. Hence, the plaintiffs in error were convicted of playing "stud-poker" and not "pangingui," as argued in their brief.

An inference sought to be conveyed by paragraph XX (page 66) of the brief of plaintiffs in error is likewise misleading. Their brief states:

> "The 40th specification relates to the refusal of the court to give the following instructions requested by the defendants:
>
> > "You are instructed that the testimony of an accomplice should be viewed with distrust."

An examination of instructions No. 6, page 25 of the transcript will show that the court instructed the jury that:

> "The testimony of an accomplice ought to be viewed with distrust."

Unless counsel intended this court to infer that said instruction was not given, it is not apparent what purpose is served by insisting upon the said assignment.

Of a like misleadnig nature are the statements and insinuations of counsel that the U. S. Marshal, Judge and U. S. Attorney were prejudiced and unfair. Does any one suppose that counsel would have failed to allege prejudice on the part of the marshal in their affidavit in support of their motion for the appointment of an elisor and would have admitted in their argument of said motion (Transcript, page 49) that no "personal animus" was shown, if any prejudice or personal animus had existed? Certainly not. All this argument and lamentation about prejudice and unfairness is an *"afterthought."* The desperateness of their situation is manifest from counsel's comments upon the appearance in the record in this case of the General Remarks of the Court upon gambling made at the time of pronouncing judgment.

If counsel had had sufficient interest in the matter to have read paragraph one of Rule 14 of Rules of This

Court, it is more than probable that the reason for the appearance of such "remarks" in the record would have become apparent.

We submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

F. M. SAXTON,

United States Attorney, Second Division, District of Alaska.